INDEX

	PAGE
Statement of the Matter Involved	2
Jurisdiction	3
Opinions Below	3
Statutes and Rules Involved	4
Statement of the Case	4
Questions Presented	5
Specifications of Error	5
Reasons for Allowance of Writ	6
Prayer	10

CASES CITED

Cooke v. United States, 267 U. S. 517	8
Gompers v. Buck's Stove & Range Co., 221 U. S. 418	8
Grosjean v. American Press Publishing Co., 297 U. S. 233	9
Hood v. United States, 23 F. 2d 472	6
Nye v. United States, 313 U. S. 33	8
Pendergast v. United States, 317 U. S. 412	8
People v. Pirfenbrink, 96 Ill. 68	8
State ex rel. Grebstein v. Lehrman, 129 So. 818	8
Toledo Newspaper Co. v. United States, 247 U. S. 402	8
Tumey v. Ohio, 273 U. S. 510	8
United States v. Dachis, 36 F. 2d 601	8
United States v. Rice, 192 Fed. 720	6
United States v. William Z. Foster et al., C 128-87	2
Wilson v. United States, 65 F. 2d 621	8
Wright v. Henkel, 190 U. S. 40	6

STATUTES CITED

	PAGE
Advisory Commission Note, 18 U. S. C., App. p. 308	6
13 Corpus Juris 85	8
Federal Rules of Criminal Procedure, Rule 42(a)	4, 7
Judicial Code, Section 240(a)	3
18 U. S. C., Section 401	4
28 U. S. C., Section 1254(1)	3
Rule of Criminal Procedure, Section 46(a)	6
Rule of Criminal Procedure, Section 32(a)	7
U. S. Constitution, Fifth and Sixth Amendments	9

Supreme Court of the United States

October Term, 1949 — Nos. 255, 256, 257, 258

GUS HALL, *Petitioner;*

vs.

THE UNITED STATES OF AMERICA.

HENRY WINSTON, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

THE UNITED STATES OF AMERICA, ex rel. GUS HALL, *Petitioner,*

vs.

JAMES MULCAHY, United States Marshal.

THE UNITED STATES OF AMERICA, ex rel. HENRY WINSTON, *Petitioner,*

vs.

JAMES MULCAHY, United States Marshal.

Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Gus Hall and Henry Winston, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made July 14, 1949 (R. 202),* affirming orders of the District Court for the Southern District of New York, which (a) held petitioners in contempt of court, and (b) dismissed writs of habeas corpus, directed to their imprisonment therefor.

---

* Though there were separate records in the *Hall* and *Winston* cases, their pagination is, for our purposes, identical. The habeas corpus record also was separate for each petitioner. Though submitted, no citations are made therefrom.

Statement of the Matter Involved

Petitioners are defendants in *United States* v. *William Z. Foster et al.*, C 128-87, now on trial in the Southern District of New York, before Judge Harold R. Medina. They had each been enlarged on bail of $5,000 following their arrest on return of the indictments July 28, 1948. The indictments were laid under 18 U. S. C. A., Section 10, commonly known as the Smith Act.

On June 3, 1949, Judge Medina, in course of the trial, remanded petitioners "for the remainder of the trial" following a courtroom incident (R. 19). In thus remanding petitioners, the Trial Judge neither found nor certified that any contempt had been committed by them. The only order then made was a bare entry dated June 3, 1949, remanding petitioners to custody of the United States Marshal (R. 51). On June 6th, petitioners obtained writs of habeas corpus from Judge Leibell of the same Court, returnable before him. On June 7th, the writs were heard. On June 8th, the writs still pending, Judge Leibell submitted to Judge Medina this question: "Was the remanding of the defendants, Hall and Winston on June 3, 1949, intended as a form of punishment for any misbehavior on their parts in the presence of the Court, constituting a contempt of court under Tit. 18, U. S. C., Sec. 401(a)?" (R. 114).

Then for the first time (after petitioners had already been remanded and in custody for five days) Judge Medina, in his answer to Judge Leibell's query, assigned contempt as a ground for his action of June 3rd: "My answer is that the remanding of the defendants, Hall and Winston on June 3rd, 1949, was intended, first, as an exercise of my plenary powers to remand the defendants or any of them at any time and as a form of punishment for misbehavior on their parts, constituting a contempt of court under Tit. 18, U. S. C., Sec. 401(a)" (R. 114).

The same day, June 8th, Judge Medina issued judgments and commitments as prescribed by Rule 42(a) of the Rules of Criminal Procedure finding and certifying that petitioners were each guilty of contempt by reason of the occurrence on June 3rd, and directing their "imprisonment for the remainder of the trial" (R. 116).

Judge Leibell thereupon held that these judgments of June 8th superseded the proceedings of June 3rd and accordingly dismissed the writs. Appeals were then taken to the Court of Appeals from both the dismissal of the writs and the judgments of contempt (R. 161). Argument was had June 17th. On July 14th the Court of Appeals unanimously affirmed both determinations. Petitioners have joined their respective petitions for a writ of certiorari pursuant to Rule 48 of the Rules of this Court.

Thereafter, on August 4, 1949, application was made to Judge Medina, pursuant to Federal Rule of Criminal Procedure 35 for a reduction of their sentence to the time then served. After argument, this application was denied without opinion.

Jurisdiction

The Court of Appeal's judgment was entered July 14, 1949 (R. 214). Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C., Sec. 1254(1).

Opinions Below

Neither the Court of Appeals nor District Judge Leibell's opinion has yet been officially reported. The former appears at R. 202; the latter at R. 132. Judge Medina rendered no opinion.

Statutes and Rules Involved

The following sections of 18 U. S. Code:

"401. Power of Court

A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

Rule 42(a) of the Federal Rules of Criminal Procedure:

Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the Judge and entered of record."

Statement of the Case

The case is stated above under the heading "Statement of the Matter Involved".

Questions Presented

(1) Whether the remand action of Judge Medina, taken June 3rd, was lawful and within his authority.

(2) Whether the judgments of June 8th may retroactively cure any defect in the remand action of June 3rd.

(3) Whether the judgments of June 8th may be retroactively effective respecting the remand action of June 3rd since (a) petitioners had already been imprisoned for five days when such judgments were made, and (b) neither in the remand action of June 3rd nor at any time prior to June 8th was contempt of court specified or otherwise suggested as a ground of their imprisonment.

(4) Whether the sentence of imprisonment here imposed, i.e., "for the remainder of the trial", considered in the circumstances of this trial, possesses the definiteness and certainty of duration and character required by law.

(5) Whether such sentence imposes upon petitioners a quality and degree of pressure and compulsion which so curtails the full, free and unobstructed presentation of their defense as to deprive them of their constitutional rights under the Fifth and Sixth Amendments.

Specifications of Error

The Court of Appeals erred in

1. Affirming the orders (a) dismissing the writs of habeas corpus and (b) adjudging petitioners in contempt of court.

2. Failing to hold that petitioners' remand of June 3rd and revocation of their bail on that date were in excess of the Trial Court's authority.

3. Holding that the judgment of June 8, 1949, was retroactively effective to June 3, 1949.

4. Holding that the sentences here imposed were lawfully authorized.

5. Holding that petitioners' sentence and imprisonment were in compliance with the requirements prescribed by Rule 42(a) of the Rules of Criminal Procedure.

Reasons for Allowance of Writ

This petition presents several important questions of federal law decided by the Court of Appeals which have not, but should be, settled by this Court or which were decided in conflict with applicable decisions of this Court. The Court of Appeals has so decided them as to sanction a drastic departure from the accepted and usual course of judicial proceedings and to call for an exercise of this Court's supervisory power. The questions referred to, the decisions thereon and other considerations related thereto are more particularly the following:

1. Was Judge Medina acting within his lawful authority in revoking petitioners' bail on June 3rd and remanding them to custody? We contend that he was not. The Court of Appeals, by reason of its erroneous determination, failed to reach this question. No "plenary" power exists for any such action either to punish for contempt or otherwise. Petitioners' right to bail before conviction, subject to certain exceptions not here applicable, is absolute. Rule of Criminal Procedure 46(a); cf. Advisory Commission Note, 18 U. S. C., Appendix p. 308; *Wright* v. *Henkel,* 190 U. S. 40. The limited power of revocation allowed does not cover this case. *Hood* v. *U. S.,* 23 F. 2d 472; *U. S.* v. *Rice,* 192 Fed. 720. These holdings are rooted in the principle that punishment before conviction is abhorrent to the law

Wright v. *Henkel, supra.* Petitioners' remand on June 3rd was a clear violation of their basic right to bail under Rule 46(a) as thus construed and applied. To sanction such a procedure would subordinate this right to the arbitrary power of a trial judge. No authority has been cited for such a result. The sense of those cited above forbid it.

2. Do the judgments of June 8th validate the remand action of June 3rd? For the reasons stated and the authorities cited in paragraph 1 above, the impressment of a contempt judgment upon the unauthorized revocation of bail five days earlier cannot be said to change the intrinsic character of the action originally taken.

3. Were the judgments of June 8th retroactively effective to June 3rd, so as to make the remand action in effect a judgment for contempt? The Court of Appeals decided they were, erroneously, we contend. Neither the record nor the law applicable thereto sustains such a result. It rather appears here that contempt was an afterthought first suggested in the answer to Judge Leibell's query of June 8th and only then cast into legal judgment form the same day (R. 116). The order previously made June 3rd (R. 51) upon the oral direction in the minutes (R. 19) makes no reference whatever to contempt and certainly cannot be seriously urged as a compliance with Rule of Criminal Procedure 42(a) which requires a factual recital and certification of the contumacious conduct in the Court's presence and entry of an order thereon reciting the same facts. The returns filed in the habeas corpus proceedings allege the order of remand as the reason for detention (R. 56). Nor can these judgments of June 8th be said to comply with Rule of Criminal Procedure 32(a) which requires here that "Sentence shall be imposed without unreasonable delay".

These defects and omissions may not be dismissed as mere irregularities. The safeguards prescribed by Rule 42(a) which they violate, are in consonance with the cau-

tion and scrutiny that this Court has repeatedly applied in reviewing exercises of the contempt power. See *Cooke* v. *U. S.*, 267 U. S. 517, 539; *Nye* v. *U. S.*, 313 U. S. 33, approving dissent by Holmes, J., in *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 402, 423; *Pendergast* v. *U. S.*, 317 U. S. 412, 420.

4. Was the imprisonment here imposed, i.e., "for the remainder of the trial", a sentence definite and certain as required by law? The Court of Appeals decided it was, erroneously, we contend. The requirement of definiteness in punitive, as distinct from coercive, contempt is well established. *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418; *Wilson* v. *U. S.*, 65 F. 2d 621; *U. S.* v. *Dachis*, 36 F. 2d 601. The contempt sentence "must name a definite period of imprisonment". 13 *Corpus Juris* 85 and cases there cited. This sentence being punitive is not definite according to the intent of the cases just cited.* Its duration depends upon a whole series of factors so imponderable and unpredictable as to deprive it of all lawful and rational relation to the offense for which it was purportedly imposed. The illness of a juror or witness, protracted rebuttal by the Government, the time other co-defendants consume in presentation of their defense, and many other contingencies not difficult to imagine must thus determine the duration of petitioners' imprisonment.

Indeed, by thus making the term of this sentence coextensive with the Government's own rebuttal and cross-examination of the defense witnesses, the Court has, in effect, delegated his judicial sentencing power to the Government prosecutor and has thereby run afoul of this Court's decision in *Tumey* v. *Ohio*, 273 U. S. 510.

Nor is this sentence much different from an imprisonment "until further order of the Court" held to be invalid for want of definiteness in *State ex rel. Grebstein* v. *Lehrman*, 129 So. 818, and *People* v. *Pirfenbrink*, 96 Ill. 68.

---

* Neither Government counsel nor we have been able to locate a single prior case in which such a sentence has ever been imposed.

The "indeterminate sentence" cases cited by the Court of Appeals do not alter the above result. There, the mathematical maximum satisfied the requirement of definiteness. Again, unlike here, the indefiniteness was there occasioned by a purpose to rehabilitate, not to punish.

5. Does this sentence compel such a curtailment of the free and unobstructed presentation of petitioners' defense as to be an unconstitutional deprivation under the Fifth and Sixth Amendments? Whether or not intended, the effect of such a sentence is to pressure petitioners, on pain of continued imprisonment, to hurry their defense to a close. Their access to and consultation with counsel and their co-defendants are and have been seriously curtailed. This is particularly so where, as here, petitioners and their co-defendants are on trial for their views and advocacy and opportunity for unobstructed consultation is indispensable to preparation of an effective defense. Thus, this sentence is not only inherently indefinite but its duration is in effect limited upon petitioners' involuntary surrender or, at least, serious impairment of constitutional rights which are indispensable to anyone under trial, as they are, for so serious a crime. We submit that no sentence should be permitted to stand whose duration, aside from its quantitative uncertainty, is conditioned upon consequences of such a character. In the circumstances, we believe that the principle of "undue burden" upon the free exercise of a constitutional right is applicable. *Grosjean* v. *American Press Publishing Co.*, 297 U. S. 233.

Prayer

For the foregoing reasons, your petitioners pray that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court and that the judgments and decision of the Court of Appeals may be reversed and your petitioners granted such other and further relief as may be just and proper.

Dated, August 11, 1949.

George W. Crockett, Jr.,
Richard Gladstein,
Abraham J. Isserman,
Louis F. McCabe,
Harry Sacher,
Attorneys,
401 Broadway, Room 1602,
New York 13, N. Y.

Special Counsel:

Paul J. Kern,
11 West 42nd Street,
New York City.

Charles H. Houston,
615 F Street N. W.,
Washington, D. C.

Walter F. Dodd,
30 N. LaSalle Street,
Chicago, Ill.

INDEX

	Page No.
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute and rule involved	2
Statement	3
Argument	8
Conclusion	12

CITATIONS

Cases:

Farnsworth v. *Zerbst*, 97 F. 2d 255	11
Farnsworth v. *Zerbst*, 98 F. 2d 541	11
Hirabayashi v. *United States*, 320 U. S. 81	9
Hood v. *United States*, 23 F. 2d 472, certiorari denied, 277 U. S. 588	8
Kirk v. *Squier*, 150 F. 2d 3, certiorari denied, 326 U. S. 775	11
Sims v. *Rives*, 84 F. 2d 871, certiorari denied, 298 U. S. 682	11
Sunal v. *Large*, 332 U. S. 174	12
Todorow v. *United States*, 173 F. 2d 439, certiorari denied, 337 U. S. 925	8
United States v. *Daugherty*, 269 U. S. 360	10
United States v. *Rice*, 192 Fed. 720	8

Statute and rule:

18 U.S.C. (1948 rev.) 401	2, 6
Federal Rules of Criminal Procedure, Rule 42(a)	3, 7, 9

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 255

GUS HALL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 256

HENRY WINSTON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 257

UNITED STATES OF AMERICA EX REL. GUS HALL, PETITIONER

v.

JAMES MULCAHY, UNITED STATES MARSHAL

No. 258

UNITED STATES OF AMERICA EX REL. HENRY WINSTON, PETITIONER

v.

JAMES MULCAHY, UNITED STATES MARSHAL

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals covering all four cases (No. 255, R. 202-213 [1]) has not yet been reported.

[1] The records in the criminal cases, Nos. 255 and 256, are identical and the records in the habeas corpus cases, Nos. 257 and 258, also are identical. The habeas corpus cases arose

JURISDICTION

The judgments of the Court of Appeals were entered July 14, 1949 (No. 255, R. 214; No. 257, R. 203). The petition for writs of certiorari was filed August 12, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

Petitioners do not contend that their misconduct did not constitute criminal contempt. The questions presented are:

1. Whether the trial judge had power to enter the judgments of conviction of contempt of court and the certificates required by Rule 42(a), F. R. Crim. P., on the third court day after the contempts were committed and the oral orders remanding petitioners to the custody of the marshal were made.

2. Whether the sentences to imprisonment for "the remainder of the trial in *United States* v. *William Z. Foster, et al.*, C 128-87" are so indefinite as to require resentencing.

STATUTE AND RULE INVOLVED

18 U. S. C. (1948 rev.) 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

---

out of the criminal cases and involve the same facts. For convenience, we shall refer only to the records in Nos. 255 and 257.

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42(a), Federal Rules of Criminal Procedure, provides:

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

Petitioners are two of eleven defendants presently on trial in the United States District Court for the Southern District of New York under an indictment which charges that they wilfully conspired (1) to organize a society which teaches and advocates the duty and necessity of overthrowing and destroying the Government of the United States by force and violence and (2) to teach and advocate the duty and necessity of overthrowing the Government of the United States by force and violence. On June 3, 1949, after the trial had been in progress for several months, the court, Judge Medina presiding, sentenced a co-defend-

ant, John Gates, to imprisonment for contempt committed by refusing to answer a question on cross-examination (No. 255, R. 18, 19). The following episode then occurred in the midst of the judicial proceedings, as shown by the record (No. 255, R. 19):

> (The defendants stand in the courtroom.)
>
> DEFENDANT WINSTON: If your Honor please, may I now be heard? More than 5,000 Negroes have been lynched in this country for such——
>
> THE COURT: Now, Mr. Winston——
>
> DEFENDANT WINSTON: ——and the Government of the United States should be ashamed for bringing in such monstrosity.
>
> THE COURT: Mr. Winston, I hereby direct that you be remanded for the remainder of the trial.
>
> DEFENDANT HALL: It sounds more like a kangaroo court than a court of the United States. I have heard more law and more law and more constitutional rights in kangaroo courts.
>
> THE COURT: Now let me see, this is Mr. Hall——
>
> DEFENDANT HALL: That is right, this is Mr. Hall.
>
> THE COURT: Mr. Hall, you are hereby remanded for the balance of the trial.

At this juncture, one of the defense counsel addressed the court and, in the course of his argument, the court suggested that "* * * it would be prudent if the defendants resumed their seats * * *" (No. 255, R. 19). Counsel disregarded

the court's suggestion, as did the defendants, who remained standing (No. 255, R. 19-20). The defendants remained standing in the court room while three of the defense counsel made arguments to the court (No. 255, R. 19-21). Then the defendant Dennis, who appears *pro se,* addressed the court. After some colloquy with the court, he stated to his co-defendants (No. 255, R. 21):

> Well, first I would like to urge upon my co-defendants that they at this time do not speak—they can act as they see fit. I urge them not to call for any provocation.

Only then did the defendants take their seats (No. 255, R. 21).

In accordance with the court's oral orders made in the course of the disturbance (*supra,* p. 4), petitioners were placed in the custody of the marshal.[2]

On June 6, 1949, petitioners filed identical petitions for writs of habeas corpus alleging generally that the oral orders of June 3, 1949, were illegal (No. 257, R. 52-54). Writs were issued the same day (No. 257, R. 55), and a hearing was had on the following day, Judge Leibell presiding. The marshal filed identical returns at that time, stating that he had petitioners in his custody pursuant to Judge Medina's orders of June 3, 1949 (No. 257, R. 56).

---

[2] The oral directions were reduced to writing in the form of "remand" orders (No. 255, R. 51).

On June 8, 1949, Judge Leibell summoned counsel to the court room and stated that the record of the proceedings before Judge Medina was not clear to him and that he did not understand whether the orders of June 3, 1949, remanding petitioners to the marshal's custody, were intended as punishment for contempt or as revocation of bail. He requested that a clarifying question which he formulated be presented to Judge Medina out of the presence of the jury, and that Judge Medina answer the question on the record. (No. 257, R. 109-113.) The question was (No. 257, R. 110):

> Was the remanding of the defendants Hall and Winston on June 3, 1949, intended as a form of punishment for any misbehavior on their part in the presence of the Court, constituting a contempt of court under Title 18, United States Code, Section 401(a)?

The question was immediately presented to Judge Medina and he promptly made the following reply (No. 255, R. 114):

> My answer is that the remanding of the defendants Hall and Winston on June 3, 1949, was intended, first, as an exercise of my plenary powers to remand the defendants, or any of them, at any time, and as a form of punishment for misbehavior on their part in the presence of the Court, constituting a contempt of Court under Title 18 U. S. C., Section 401(a).[3]

---

[3] It is clear that both Judge Leibell and Judge Medina intended to refer to Title 18 U.S.C., Section 401 (*1*), *supra*, p. 2. (No. 255, R. 115.)

On the same day, June 8, 1949, Judge Medina entered a judgment and certificate as to each petitioner, as required by Rule 42(a), F. R. Crim. P. (No. 255, R. 116-118). Each judgment states that on June 3, 1949, the defendant was "found guilty of contempt of court through actively participating in a disturbance in the courtroom in the course of the judicial proceedings, as set forth in the attached certificate." Each certificate recites that the contempt was committed in the presence of the court; that a week earlier, when the co-defendant Davis spoke out in the courtroom in the course of the judicial proceedings, the court warned all the defendants that sanctions would be imposed if they persisted in their tactics of disrupting the proceedings; that in the course of the disturbance on June 3, 1949, the two petitioners stepped past the end of the counsel table and toward the bench in a disorderly and threatening manner and shouted at the court in loud, angry voices; and that the situation was so serious that it became necessary to send for additional deputy marshals to assist in restoring order and to prevent further incidents in the courtroom.

On the following day, June 9, 1949, before Judge Medina, petitioners moved to set aside the judgments. The motions were denied. (No. 255, R. 122-131.)

Copies of the judgments and certificates were brought to the attention of Judge Leibell, and on June 9, 1949, he filed an opinion dismissing the writs of habeas corpus (No. 257, R. 121-130).

Judge Leibell held that petitioners were in custody pursuant to judgments of a court which had jurisdiction, and that the appropriate remedy to challenge the validity of the judgments was by appeal, not collateral attack.

On appeals to the Court of Appeals for the Second Circuit, the court held that the habeas corpus court properly dismissed the writs because the remedy of appeal was available to petitioners. The court also affirmed the contempt judgments as proper. (No. 255, R. 202-213.)

ARGUMENT

1. Petitioners were remanded to the custody of the marshal on June 3, 1949, because they committed contempts in the presence of the court in the course of judicial proceedings. They argue (Pet. 6-7) that in effect this was a revocation of their bail, and that the trial judge lacked power to take such action. As the Court of Appeals said (No. 255, R. 212-213), there is no occasion to consider the question whether bail may be revoked prior to conviction under circumstances such as occurred here.[4] For assuming, *arguendo,* that the court had no such power, the court did have power to punish petitioners for contempt and they are

[4] On the trial court's power to remand a defendant during the trial, see *United States* v. *Rice,* 192 Fed. 720, 721 (C.C.S.D. N.Y.); *Hood* v. *United States,* 23 F. 2d 472, 475 (C.A. 8), certiorari denied, 277 U. S. 588; *Todorow* v. *United States,* 173 F. 2d 439, 448 (C.A. 9), certiorari denied, 337 U. S. 925, and the government's brief in opposition to the petition for certiorari in the last-named case, Oct. Term 1948, No. 727, pp. 17-19.

confined, as we show below, pursuant to valid judgments convicting them of contempt. Cf. *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105.

2. Petitioners attack the validity of the contempt judgments (Pet. 7-8) on the ground that it was the duty of the trial judge to enter the formal judgments and certificates on June 3, 1949, at the time they were placed in custody, and that the court lacked power to enter the judgments five calendar days and three court days later, on June 8. This argument, we submit, is patently without merit.

We know of no rule which requires that when a judge is confronted with a disturbance in his court room he must stay his hand until he has first prepared formal judgments and certificates.[5] On the contrary, it is his first duty to restore order in the judicial proceedings and then to formalize his action by entering a judgment and the certificate required by Rule 42(a). This is what Judge Medina did. He took speedy, firm action to stop the loud, angry shouting in which petitioners were engaged, and then he executed the formal papers required by Rule 42(a). The practice which he followed is that which judges usually follow in making a decision from the bench and later entering a formal order or judgment.

---

[5] Petitioners' assertion that the contempt judgments were an "afterthought" designed to cure what really amounted to revocation of bail is specious. The oral orders of June 3 were precipitated by the disturbance and petitioners' contemptuous remarks and were clearly tantamount to judgments committing them for their contempt.

The fallacy of petitioners' contention is demonstrated by considering what would have happened if Judge Medina had not made the certificates required by Rule 42(a). Undoubtedly, the court below on appeal would have remanded the cases to him for the preparation and entry of such certificates. If a trial court has jurisdiction to correct such a deficiency on remand, it necessarily must have the same jurisdiction to complete the action required of it, prior to the initiation of appellate proceedings.

3. Petitioners also argue (Pet. 8-9) that their sentences to imprisonment for the remainder of the trial are not sufficiently definite. The court below properly rejected this argument.

The test to be applied in determining whether a sentence is sufficiently definite was formulated by this Court in *United States* v. *Daugherty,* 269 U. S. 360, 363: "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded." Clearly, the date of commencement of petitioners' sentences was definitely fixed. They began on June 3, 1949, when petitioners were committed to the custody of the marshal. In considering whether the terminal date of the sentences is sufficiently definite, it is significant that their termination is governed by an ascertainable event which is certain to occur and which

is not within the power of the court to control so as to effect an increase or decrease of the sentences. The date on which the trial ends is one which the marshal will have no difficulty in knowing and petitioners will easily be able to recognize. Hence, there is no possibility that they will be incarcerated beyond the time intended by the trial judge and specified in the judgments.

As the court below noted (No. 255, R. 212), the sentences involved here are no less definite than those which are imposed in the United States District Court for the District of Columbia under the local indeterminate sentence law. *Sims* v. *Rives,* 84 F. 2d 871 (C.A.D.C.), certiorari denied, 298 U.S. 682; *Farnsworth* v. *Zerbst,* 97 F. 2d 255 (C.A. 5); *Farnsworth* v. *Zerbst,* 98 F. 2d 541 (C.A. 5). Similarly, there is no greater indefiniteness in petitioners' sentences than there is in a case where a defendant is given consecutive sentences. At the time the sentences are imposed, neither the defendant nor his jailer can know with certainty when the first sentence will end and the second begin. Thus, in *Kirk* v. *Squier,* 150 F. 2d 3 (C.A. 9), certiorari denied, 326 U.S. 775, the defendant was sentenced to imprisonment for 37 years, to be served consecutively to a life sentence he was then serving. The life sentence had been imposed by a California court, and under California law the possibility existed that the prisoner would be paroled after serving part of his sentence. The Court of Appeals held that while the defendant was unable to know

the precise date on which his federal sentence would commence, there was an ascertainable event by which that time could be fixed.

Finally, apparently as an appeal *in misericordia*, petitioners argue that their incarceration makes it more difficult for them to consult with counsel in the preparation and conduct of their defense (Pet. 9). The short answer to the argument is that, as Judge Medina's certificates recite (No. 255, R. 117), petitioners and their co-defendants were warned in open court exactly one week prior to the incident in question that the court would tolerate no further obstruction of the administration of justice, and that penalties would be invoked if they refused to pay heed to the court's warning. Thus, the choice was for petitioners. They elected to persist in their contumacious conduct in the teeth of the court's warning, and having so elected they are hardly in a position to complain that their incarceration inconveniences them in consulting with counsel.[6]

CONCLUSION

The facts recited in the trial judge's certificates demonstrate that petitioners were guilty of grossly contemptuous conduct, apparently in an effort to subvert the administration of justice. Petitioners

---

[6] Although the petition (p. 1) prays review of the judgments in the habeas corpus cases, no reason is assigned why those judgments are erroneous. The Court of Appeals was clearly correct in holding (No. 255, R. 209-210) that habeas corpus will not serve as a substitute for the remedy of review by appeal, available to and invoked by petitioners. See, e.g., *Sunal* v. *Large*, 332 U. S. 174.

do not dispute the fact that they are guilty of contempt. The lower courts were clearly correct, and none of the arguments petitioners advance presents any question warranting review. We respectfully submit, therefore, that the petition for writs of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

SEPTEMBER 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 835734 100